



## STATE OF WISCONSIN Division of Hearings and Appeals

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In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 206853

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Pursuant to petition filed November 15, 2022, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Wednesday, January 4, 2023 at 09:45 AM at Milwaukee, Wisconsin. The hearing record was held open through January 6, 2023 for additional evidence from the petitioner.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Office of the Inspector General  
Department of Health Services - OIG  
PO Box 309  
Madison, WI 53701

Respondent:

██████████  
██████████  
████████████████████

**ADMINISTRATIVE LAW JUDGE:**

Beth Whitaker  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits in Milwaukee County from June 6, 2018 through December 18, 2021.
2. On May 9, 2018 respondent applied for FS and did not report [REDACTED] self-employment.
3. On May 1, 2019, respondent completed an application for FS and did not report [REDACTED] self-employment.
4. On October 8, 2019, respondent completed a six month report form (SMRF) did not report [REDACTED] self-employment.
5. On October 5, 2021 respondent applied for FS and did not report [REDACTED] self-employment.
6. The agency provided respondent with Enrollment and Benefits booklets informing her of FS program rules seven dates between March 8, 2017 and October 28, 2022.
7. On October 19, 2021, respondent filed for bankruptcy and reported wages from [REDACTED] for 2018 and 2019, beginning when she started the business in January 2018.
8. Respondent submitted a 2021 IRS 1040 filed tax return but did not respond to requests for previous years' tax returns.
9. On August 9, 2022, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that Petitioner failed to report self-employment and income in FS application.

## DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;  
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

*FoodShare Wisconsin Handbook*, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

*Kuehn*, 11 Wis.2d at 26.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

Respondent testified that she did not report in her bankruptcy filing that she began self-employment in 2018, rather that that information was provided by her attorney and was incorrect. She argued that the information could not be attributed to her because it was not in her handwriting. She said that she started the business in 2019 but had no income because of start-up costs and did not understand that she had to report self-employment if there was no net income after expenses. She acknowledged that she had not provided tax returns for the years in question and explained that she was waiting for them and was involved in another administrative hearing for which she provided that and mistakenly thought she had provided them in this matter.

Respondent’s testimony was self-serving and not credible. Her own bankruptcy filings filed on her behalf and signed with an attestation that the information provided was true are sufficient to prove that she had self-

employment activity and income beginning in 2018, which she admittedly did not report. It is not plausible that the repeated inconsistencies in her information are accidental. She had an opportunity to prove the accuracy of her claims by submitting income tax returns. After the hearing she submitted partial tax returns for 2020 and 2018, showing that she was engaged in self-employment, which she was required to report and failed to do so. She did not provide the 1040 form, just the Schedule C for those years and did not provide any tax return information for 2018. She had a net loss of income for tax purposes in 2019 and a profit in 2020. Having a net income loss for tax purposes does not absolve the respondent from correctly reporting self-employment. The rules for treating income to determine benefit eligibility is not the same as for determining tax liability. The loss reported on the 2019 1040 form in no way justified respondent's false report in the FS applications that she was not self-employed.

She was made aware of FS program rules and intentionally withheld income information contrary to those rules in order to receive benefits. Her withholding of information to obtain benefits was clearly intentional.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

### **CONCLUSIONS OF LAW**

1. The respondent violated, and intended to violate, the FS program rule specifying that No person may provide false information or withhold information to obtain benefits.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

**NOW, THEREFORE,** it is

**ORDERED**

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

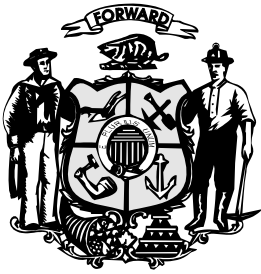
Given under my hand at the City of Madison,  
Wisconsin, this 20th day of January, 2023



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\sBeth Whitaker  
Administrative Law Judge  
Division of Hearings and Appeals

- c: Office of the Inspector General - email
- Public Assistance Collection Unit - email
- Division of Health Care Access and Accountability - email
- Shauna Tucker - email



## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on January 20, 2023.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[REDACTED]